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No. 84-550

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BRAE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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TABLE OF AUTHORITIES

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Petitioner Interstate Commerce Commission submits this brief in reply to the brief in opposition filed by Brae Corporation, et al., concerning the joint rate issue.[1]

Because of respondents' emphasis on the Lee Amendment to the Staggers Act, we wish to place

[1] Concerning the car hire issue, also raised by respondents, and discussed in a separate brief in opposition filed by the Canadian Railroads, we believe no further argument is necessary, and we stand on the arguments in our petition.

that amendment in its proper perspective. Respondents state (Br. in Opp. 15) that their "point * * * is only that the Commission must consider, when the issue is properly raised, whether * * * an exemption would conflict with the language and intention of the Lee Amendment." Respondents also state that the National Rail Transportation policies "are not isolated abstractions; they are anchored in and illuminated by the policies of the Lee Amendment" (*id.* at 17), and that "[t]he policies of the Lee Amendment find expression in several elements of the rail transportation policy" (*id.* at 15). One would think, from their submission, that the Lee Amendment is the centerpiece of the Staggers Act, the cynosure of the Rail Transportation Policy.

In truth, the Lee Amendment is a relatively minor adjustment to a rarely-used provision giving carriers an alternative means of cancelling a small subcategory of unremunerative joint rates. The action of the Commission at issue is not so much an exemption from the Lee Amendment as it is an exemption from the joint rate requirements to which the Lee Amendment stands as a limitation to an exception. To contend that the Rail Transportation Policy is "anchored in" the Lee Amendment or that the policies of the Lee Amendment "find expression in" that Policy is totally unfounded. Indeed, in the entire legislative history of the Rail Transportation Policy, the Lee Amendment is not so much as mentioned.

Under 49 U.S.C. 10705, if a carrier that has entered into a joint rate agreement with other carriers withdraws from the joint rate without the consent of all other parties to the agreement, that action is subject to possible suspension and investigation. Section 10705(e) gives the Commission discretionary

authority to suspend the cancellation tariff and institute a proceeding in which the cancelling carrier has the burden of proving that cancellation is in the public interest. Until approximately 1979, the Commission routinely suspended such tariff filings, making joint rate cancellations "extraordinarily expensive and time consuming" (Pet. App. 106a); see *Southern Ry.* v. *ICC*, 681 F.2d 29, 34 (D.C. Cir. 1982).

In 1980, as part of the Staggers Act, Congress instituted a limited procedure that allows revenue inadequate carriers to withdraw unilaterally from joint rate agreements whenever their share of the joint rate revenue is less than 110 percent of their variable costs. See 49 U.S.C. 10705a(a)(2)(B). The Lee Amendment is an exception to this provision. Whenever the cancelling carrier elects to proceed under 49 U.S.C. 10705a, the Lee Amendment allows certain small carriers who are parties to the agreement to protest the cancellation on limited and specified grounds. See 49 U.S.C. 10705a(i) and (j).

Since 1979, however, the Commission has abandoned its former policy of suspending tariffs that cancel joint rates, and now routinely allows such tariffs to go into effect. Accordingly, Section 10705(e) now controls the vast majority of joint rate cancellations. As a result, Section 10705a—and with it the Lee Amendment—is rarely employed and of little significance.[2]

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[2] That the Commission has chosen, as a matter of policy, to use the Lee Amendment criteria as "guidelines" in determining whether joint rate cancellations are in the public interest under 49 U.S.C. 10705(e) (see *Restructured Rates on Recyclables—Conrail*, 365 I.C.C. 596, 614 (1982), rev'd on other grounds, 704 F.2d 638 (D.C. Cir. 1983)) does not sup-

There is no support for the proposition that the Lee Amendment stands as an obstacle to the Commission's exercise of its authority under other provisions of the Interstate Commerce Act. *Southern Ry.* v. *ICC*, *supra*. Indeed, in adopting Section 10705a, Congress expressly stated its intention not to disturb other means by which carriers might obtain relief from joint rate agreements. H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 112 (1980). The Conference Report states that these other authorities, which presumably include Section 10705(e) and the exemption authority, "should be adequate to remedy other joint route and division problems." *Ibid.*; see also 126 Cong. Rec. 28431 (1980) (statement of Rep. Staggers) ("Clearly, the new authority to cancel routes under the new section 10705a should not be construed to inhibit or prohibit the Commission from cancellations under existing law"). Accordingly, respondents' argument that the policies of the Lee Amendment should be interpreted as limitations on the exemption authority should be rejected.

Respondents support their view of the significance of the Lee Amendment in three ways. First, they point (Br. in Opp. 14-15) to a statement by Representative Lee, during the debate on the Lee Amendment, that "the exemption clause should never be used to 'end run' the joint rate provisions contained in section [10705a]." However, this single comment by one representative does not, as respondents claim (Br. in Opp. 14), "unequivocally express[] the in-

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port respondents' assertion (Br. in Opp. 16) that the Commission considers Rep. Lee's comments on the Amendment an "authoritative expression of the Congressional purpose" of either the exemption provision (49 U.S.C. 10505) or the National Rail Transportation Policy (49 U.S.C. 10101a).

tentions of the framers that the Commission should not use its exemption authority in a way that would undercut the policy reflected in the joint rates compromise." Rather, it is one legislator's opinion. Indeed, Representative Lee's comment is in direct contradiction to the language and legislative history of the exemption provision, which "unequivocally" demonstrates that the exemption power may be used to exempt carriers from *any provision of the Interstate Commerce Act* except those specifically excluded by 49 U.S.C. 10505(e) and (g). This is made especially clear in comments by the principal spokesmen for the Staggers Act as a whole, Representatives Staggers and Madigan, who indicated that the conferees "fully expect" the Commission to use its exemption power to abolish joint rate requirements. 126 Cong. Rec. 28430 (1980); *id.* at 28431-28432.

Second, respondents suggest (Br. in Opp. 15) that the Commission was obligated to address the Lee Amendment policies because those policies somehow "find expression in" certain elements of the National Rail Transportation Policy. However, to the extent they "find expression," it is only in the most general and attenuated sense. Nothing in any of the elements of the National Rail Transportation Policy directly addresses respondents' concern for a "fair division" of revenues between connecting carriers. If it can be said that the Commission erred in not expressly addressing the Lee Amendment policies because the Lee Amendment is impliedly incorporated in the Transportation Policy, then the same can be said for literally every policy that relates to transportation. The National Transportation Policy is exceedingly broad, general, and consists of a number of potentially conflicting elements. Nevertheless, that breadth

and generality should not be treated as a justification for courts to overturn Commission decisions whenever some conceivable application of the Policy has not been addressed. Rather, "[b]ecause the exemption provisions assign broad authority to the Commission[,] * * * the agency's interpretive domain is at its zenith and the judicial license at its nadir." *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, No. 83-1581 (D.C. Cir. March 19, 1985, slip op. 25 (a case dealing with exemption from motor contract tariff requirements).

Here, the Commission considered all relevant policies including those that respondents assert "reflect" the Lee Amendment (Pet. App. 126a), and concluded that the exemption is consistent with those policies. The court of appeals lacked authority to superimpose a different view of the content and appropriate accommodation of those policies from the one arrived at by the Commission. *Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 26-27, and *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957).

Third, respondents suggest (Br. in Opp. 13, 18, 20) that Congress itself reached a "determination" on the joint rate issue, and that the Commission was not permitted to upset Congress's "delicate compromise." This is not an accurate account of what Congress decided. It is true, as respondents point out (Br. in Opp. 11-12), that Congress rejected a Carter Administration proposal that would, by statute, have eliminated altogether the Commission's authority over all joint rail rates. It is misleading to suggest, however, that the Commission's exemption decision was based on "the same economic theory that the Carter Administration advanced and that Congress rejected"

(*id.* at 18). The exemption here at issue is significantly more limited in scope than the Administration's proposal to Congress,[3] and the Commission retains jurisdiction to reimpose joint rate requirements at any time, if it later finds that they are needed to carry out the National Rail Transportation Policy. 49 U.S.C. 10505(d).

Moreover, Congress changed most of the rate provisions of the Interstate Commerce Act in the Staggers Act, and in many of these changes a legislative balance was reached. For example, fundamental changes were made with regard to the maximum reasonable level of rates and market dominance (49 U.S.C. 10709), the minimum level of rates (49 U.S.C. 10701a(c)(4)(B)), discrimination (49 U.S.C. 10741), and contract rates (49 U.S.C. 10713). There is no suggestion in the legislative history that Congress intended to shield these "delicate compromises" from the Commission's exemption authority; on the contrary, Congress expected the Commission to pursue exemptions vigorously to introduce competition

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[3] The exemption applies only to boxcar traffic, which the Commission found (Pet. App. 113a) and the court of appeals agreed (Pet. App. 33a) is extremely competitive. The "economic theory" of the exemption—which was based on the Commission's assessment of general market structure and the recent history of declining boxcar traffic—is that the competitive character of the market for transportation in boxcars is such that large long-haul carriers will be forced to preserve joint rates with short haul carriers on efficient through routes. Pet. App. 134a, 198a. Thus, the rationale for the exemption decision here would not support a general abolition of joint rate regulation, as was proposed by the Carter Administration. Conversely, Congress's rationale in rejecting the Carter Administration proposal does not conflict with granting the exemption here.

into as many areas as possible. H.R. Conf. Rep. 96-1430, *supra*, at 105.[4] The joint rate provisions of 10705a are entitled to no special treatment.

CONCLUSION

For these reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] The Commission also exempted carriers from maximum rate regulation in this case, with the court's approval, despite the compromise on this issue reached by Congress. Similarly, the TOFC/COFC exemption undid the congressional compromise on joint and maximum rates for that traffic.

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